Supreme Court of the United States.

October Term, 1932.

No. 1.

THE TEXAS & PACIFIC RAILWAY COMPANY, LOUISIANA AND ARKANSAS RAILWAY COMPANY, ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

BRIEF OF THE CITY OF BOSTON AND THE BOSTON PORT AUTHORITY AS AMICI CURIAE.

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BRIEF OF THE CITY OF BOSTON AND THE BOSTON PORT AUTHORITY AS AMICI CURIAE.

STATEMENT.

This brief is submitted on behalf of the City of Boston and the Boston Port Authority as *amici curiae.*

The City of Boston is a municipal corporation of the Commonwealth of Massachusetts. In a large measure, the business interests and the prosperity of Boston are dependent upon traffic passing through its port.

The Boston Port Authority is a board created by an act of the legislature of the Commonwealth of Massachusetts, entitled "An Act establishing a board to be known as the Boston Port Authority, prescribing its duties and defining the Port of Boston," chapter 229, Acts of the Legislature of Massachusetts of 1929.

The primary purpose of the creation of the Boston Port Authority was the preservation and promotion

of the commerce of the Port of Boston. The most important function of the Port Authority is fostering and building up trade and commerce of the Port of Boston.

The City of Boston and the Boston Port Authority are not concerned in, and take no position with respect to, the merits of the controversy in this case between the several Gulf Ports, but both the City of Boston and the Boston Port Authority are vitally concerned in any decision of this Court affecting the right of the Port of Boston, or any other port, to the protection given by Section 3 of the Interstate Commerce Act forbidding the giving of "any undue or unreasonable preference or advantage to any particular . . . locality," or the subjecting of "any particular . . . locality . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In the order restoring this cause to the docket for re-argument, the attention of counsel is invited to the question of whether the several ports concerned may be regarded as localities within the meaning of sections 3 (1) and 15 (1) of the Interstate Commerce Act. This brief is directed solely to that question, and its purpose is to demonstrate the applicability of sections 3 (1) and 15 (1) to ports in general as *localities* within the intent and meaning of the Statute.

The Statutes Involved.

The statutes involved are Section 3 (1) of the Interstate Commerce Act, providing:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any

particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (49 USCA Sec. 3 (1)),

and section 15 (1):

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand,

or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." (49 USCA Sec. 15 (1))

ARGUMENT.

I.

The Word "Localities" as Used in the Statute Embraces Ports.

The meaning of the word "port" is dependent upon the sense in which it is used. In its narrowest sense "port" may mean only a point at which the cargo of a vessel is loaded and unloaded. In its broadest sense a "port" may comprise all of a large district in which a substantial portion of the industry of that district is incidental to shipping.

Our concern with a "port" is as to a place where ships load and unload their cargoes, where facilities are afforded for receiving, storing, and consigning goods inward and outward bound, where supplies, materials and repairs are furnished to the shipping industry, and generally embracing the varied types of industry essential to the transportation of persons or merchandise by water.

The word "locality" is relative in its nature, and its meaning as used in the statute can be ascertained only by a consideration of the context and of the facts and circumstances surrounding its use.

With reference to a statute prohibiting the importation of cattle from "certain localities in other states," it has been said:

> "The word 'locality' signifies 'a particular district; confined to a limited region; opposed to general;

limited by boundaries, large or small; as a country, a state, a county or town, or a portion thereof.' Anderson's Law Dictionary." *Pierce* v. *Dillingham*, 96 Ill. A. 300, 313.

In construing a statute of the State of Colorado providing, *inter alia*, "that not less than the current rate of per diem wages in the locality where the work is performed shall be paid ——," the Supreme Court of that state said:

> "It is contended on rehearing that the statute is void for uncertainty, in that the word 'locality' must have in its practical application a relative and variable meaning, so indefinite that it is impossible to determine how much territory is or should be embraced by the phrase 'in the locality where the work is performed.'
>
> "The word 'locality' considered in a common sense way with the context and the purpose of the act, is no more difficult of construction than multitudes of other words and phrases upheld by the courts in the administration of criminal law. There are many legal terms that cannot be defined with mathematical certainty, such as 'culpable negligence,' 'reasonable doubt,' 'felonious intent,' and '*res gestae*.' These and other terms must be construed in their common and ordinary significance, as they reasonably apply to the subject or object to which they relate. 'Locality,' as used here is equivalent to 'place,' 'near the place,' 'vicinity,' or 'neighborhood' ". *State* v. *Tibbetts*, 205 P. 776.

If the wording of the Interstate Commerce Act is susceptible of any other interpretation, an examination of the proceedings in Congress prior to the original Act and subsequent amendments will show that it was the intent of Congress to include ports within the prohibition.

II.

The History of the Enactment of Legislation Prohibiting Undue Prejudices or Preferences Conclusively Shows that the Intent of the Statute Was to Prohibit Unjust Discriminations Between Ports.

In construing a statute, the meaning of which is ambiguous or not clear on its face, resort may be had to the history of the legislation in the form of committee reports and statements made by legislators having the bill in charge. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 41 L. Ed. 1007; *Omaha & C. B. St. Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, 57 L. Ed. 1501; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 62 L. Ed. 1130; *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446.

Likewise, the practical interpretation given to a statute by an administrative body charged with its enforcement is entitled to weight. *Davis* v. *Portland Seed Co.*, 264 U. S. 403; *Boston & M. R.* v. *Hooker*, 233 U. S. 97, 58 L. Ed. 868; and such interpretation is especially impelling when that interpretation has been impliedly sanctioned by subsequent reenactment or amendments. *New York, New Haven & Hartford R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515; *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208, 61 L. Ed. 251.

With a view to ascertaining just what Congress meant by declaring unlawful "any undue or unreasonable preference or advantage to any particular . . . locality," attention is invited to the Cullom Report, S. Rep. No. 46, 49th Cong. 1st Sess., embodying the conclusions of the Senate Committee upon which the Cullom Act of February 4, 1887, was based.

The prime purpose of the Cullom Act was to prevent unjust discrimination between *persons* and *places*. At page 178 of the Report of the Committee, it was said:

> "It is the duty of Congress to undertake the regulation of the business of transportation; because of admitted abuses in its management and of acknowledged discriminations between persons and places in its practical operation — evils which it is possible to reach and remedy only through the exercise of the powers granted by the Constitution to Congress, and against which the citizen is entitled to the protection and relief the national authority can alone afford."

And at page 180, in enumerating the complaints made to the Committee against practices of the railroads which required remedial legislation, the sixth charge was:

> "That unreasonable discriminations are made between localities similarly situated."

In summarizing the complaints made to the Committee, the Report stated at page 182:

> "It will be observed that the most important, and in fact nearly all, of the foregoing complaints are based upon the practice of discrimination in one form or another. This is the principal cause of complaint against the management and operation of the transportation system of the United States, and gives rise to the questions of greatest difficulty in the regulation of interstate commerce. . . .
>
> "It is substantially agreed by all parties in interest that the great desideratum is to secure equality, so far as practicable, in the facilities for transportation afforded and the rates charged by the instrumentalities of commerce. The burden of complaint is against unfair differences in these particulars as between different places, persons, and commodities, and its essence is that these differ-

> ences are unjust in comparison with the rates allowed or facilities afforded to other persons and places for a like service under similar circumstances."

The purpose of the bill as passed is set forth in the following language found at pages 215–216 of the Report:

> "The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted, is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful and adding to the remedies now available for securing redress and enforcing punishment, and also by requiring the greatest practicable degree of publicity as to the rates, financial operations, and methods of management of the carriers."

From the earliest days of its existence, the Interstate Commerce Commission has treated ports as "localities" within the meaning of section 3 (1) of the Act. In *New York Produce Exchange* v. *Baltimore & Ohio R. Co.*, 7 I. C. C. 612, decided April 30, 1898, the New York Produce Exchange filed a complaint alleging that certain differentials in freight rates "unduly prefer Boston, Philadelphia, Baltimore, Newport News and Norfolk as localities to the locality of New York." The Commission found that the evidence did not warrant a change in the differentials complained of, and dismissed the complaint without prejudice. However, the Commission was specific in its holding that a port was a "locality" within the meaning of section 3, stating at page 683:

> "It might happen that some combination of these lines, for the purpose of promoting their

> interest at some other point, would sacrifice the port of New York, or that for the purpose of promoting their interests as to some other kind of traffic they would sacrifice this particular traffic. If anything of that sort were apparent, if there seemed to be anything arbitrary, anything unreasonable, any undue preference against this *locality* or this species of traffic, *it would be our duty to correct it.*" (Italics ours.)

In a later consideration of differential rates to Atlantic ports, the Commission again set out its conception of its duty toward competing ports under the statute prohibiting unjust discrimination between localities. In *In the Matter of Differential Rates*, 11 I. C. C. 13, decided April 27, 1905, the Commission said at page 62, with respect to the Atlantic ports:

> "If it can be properly done, these *ports* should all be kept open for the transaction of *this export business* upon such terms that each one may fairly compete for it. No marked advantage should be given, certainly not by the creation of artificial conditions, to any one *port over the other*. The ideal condition would be the establishment of such rates that enterprise at either *port* in the way of improvement in service or facilities might be rewarded by increased business and that there might exist that healthy struggle of *locality* against *locality* which is the best security for proper commercial development. This is justly demanded by the interests of the communities involved." (Italics ours.)

It was with this background of legislation and administrative construction that the Senate Committee on Interstate Commerce held extended hearings to consider regulation of rates and other questions affecting railways. These hearings culminated in the so-called "Hepburn Act", approved June 29, 1906.

That the proposed legislation then under consideration contemplated application to all ports of the United States is unmistakably shown by the communications which passed between the Senate Committee on Interstate Commerce and the Interstate Commerce Commission and the Attorney General.

On February 24, 1905, the Interstate Commerce Committee of the Senate asked "the opinion of the Commission of the effect which the pending Esch-Townsend bill would have if it became a law on the differential freight rates in favor of any particular ports of the United States, and would it be necessary to set aside these differentials in case the bill became a law?" (Page 965, Vol. 2, Hearings before Interstate Commerce Committee of the Senate, 1904–5.)

Under date of April 11, 1905, the Commission replied to the question in the negative. The following quotation from that opinion shows the Commission's conception of the applicability to "ports" of proposed legislation then under consideration:

> "It is assumed that the inquiry has reference to the provision in subdivision 6, Section IX, Article I., of the Constitution, as follows:
>
> 'No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.'
>
> "Without attempting to discuss the question at length, or to point out the absurd consequences to which a contrary conclusion would lead, the Commission holds with the utmost confidence that the exercise of authority for the regulation of rates, as proposed in the Esch-Townsend bill, would not be controlled or limited in any degree by the above-quoted provision in the Constitution. If it be assumed, as it certainly is not conceded, that this provision has any application to charges for transportation to and from the several ports, it would

> seem that such rates should be so adjusted as to avoid the prohibited preference. To establish the same rates from a given point to all ports would obviously, as it seems to us, prefer the most distant port, other things being equal. To establish rates on a uniform mileage basis, so that distance alone determined the regulation, would in many if not most cases result as a practical matter in the actual preference of one port over another. And this is all the more apparent in view of the fact that numerous 'ports' have been established from time to time at various points in the interior. If the constitutional restraint is held to apply at all to railroad charges, which appears to us improbable, then the question of what constitutes a preference depends upon a variety of circumstances and conditions besides the element of distance. In short, upon that adjustment of rates *which would place different ports* upon a basis of relative equality; and *that is precisely the aim*, among other things, *of the act to regulate commerce and of the measure in question*. The establishment of a differential might be and often would be the appropriate and only method of accomplishing the purpose of the constitutional limitation." (Italics ours.) (Page 965, Vol. 2, Hearings before the Interstate Commerce Committee of the Senate, 1904–5.)

It is obvious that Congress intended to make ports generally subject to the provisions of the Interstate Commerce Act and amendments, thereof, and that the chief concern of Congress in its consideration of proposed legislation was whether it had the *power* to extend to *ports* the regulation and protection which it desired to afford them.

The Attorney General was asked for his advice upon the governmental power to regulate the operation of railroads. Attorney General Moody, in an exhaustive opinion dated May 5, 1905, 25 Op. Atty. Gen. 435, held that the extension of regulation to ports did not

conflict with the provisions of the Constitution prohibiting the preference of the ports of one state over those of another.

The advice of the Attorney General on this point is summarized in the following extracts from his opinion:

> "Your letter, supplemented by oral communication, calls upon me to consider the governmental power to regulate the operations of railroads, especially in the respect of fixing rates for transportation, by whom that power, so far as it exists in the National Government, may be exercised constitutionally, and what limits to the power, if any, are prescribed by the Constitution.
>
> "The act to regulate commerce, approved February 4, 1887, is worthy of consideration in this connection. By it Congress undertook the regulation of railway rates in a comprehensive manner and laid down important rules for its guidance. All carriers engaged in transportation, wholly by railroad or partly by railroad and partly by water, were brought within its provisions, and the railroads running to and from the ports were clearly included. It is enacted with regard to them that all charges should be reasonable and just (sec. 1); that no person, or locality, or traffic should be subjected to any undue or unreasonable prejudice or disadvantage (sec. 3), and that there should not be a greater charge for transportation for a shorter distance than for a longer distance over the same line under substantially the same circumstances and conditions (sec. 4). This law was a legislative regulation of railway rates and therefore subject to all constitutional limitations upon the legislative authority.
>
> "This act has been before the Supreme Court repeatedly, and in many instances dissimilarity of charges, according to distance, has been approved, because, under the circumstances of the particular case, they were not unreasonable or unjust, and

in no case has it been supposed by court or counsel that the clause of the Constitution under consideration had any relevancy whatever to the subject. Yet it is perfectly clear that the Act of 1887, as interpreted by the Supreme Court, established a standard of charges which, under the claim now made, would be in conflict with the prohibition of the Constitution against port preferences.

"I conclude, therefore, that any law for the fixing of rates, according to the standard of reasonableness, impartiality, and justice, or any action taken by a subordinate administrative body in the execution of such a law, would not be obnoxious to Article I., section 9, paragraph 6, of the Constitution, even if it resulted in dissimilar rates to and from the ports of different States.

"6. Any regulation of land transportation, however exercised, would seem to be so indirect in its effect upon the ports that it could not constitute a preference between the ports of different States within the meaning of Article I, section 9, paragraph 6, of the Constitution.

"7. Reasonable, just, and impartial rates determined by legislative authority are not within the prohibition of Article I, section 9, paragraph 6, of the Constitution, even though they result in a varying charge per ton per mile to and from the ports of the different States." (Page 1662, Vol. 2, Hearings before the Interstate Commerce Committee of the Senate, 1904–5.)

It was after thorough consideration of facts and opinions that Congress enacted the Hepburn Act. In enacting Sec. 15 (1) Congress sanctioned and affirmed the administrative interpretations which the Commission had theretofore applied to ports as "localities" within the meaning of section 3 (1).

In finding ex-lake rates on grain from Oswego to New York unduly prejudicial to Oswego and unduly preferential of Buffalo in relation to rates from Buffalo to New York, the Commission, so late as 1929, held the

discrimination between the two ports forbidden by the prohibition of section 3 against undue or unreasonable discrimination between "localities." With respect thereto, in *Oswego* v. *B. & O. R. Co.*, 151 I. C. C. 717, the Commission said:

> "In view of these circumstances we find nothing in the interstate commerce act or in the decisions of the courts to indicate that we are without power to prescribe a nonprejudicial basis of rates on these commodities for the transportation which takes place within the United States. Section 3 makes it unlawful for any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular locality *in any respect whatsoever* or to subject any particular locality to any undue or unreasonable prejudice or disadvantage *in any respect whatsoever*. The sweeping character of this provision has been frequently pointed out by the courts.

In support of the last sentence of the above quotation, the Commission quoted the following portion of the opinion of this Court in *Houston and Texas Ry.* v. *U. S.*, 234 U. S. 342, 346:

> "This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had

> authority to reach. The purpose of the measure was thus emphatically stated in the elaborate report of the Senate Committee on Interstate Commerce which accompanied it. 'The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations . . . . (Senate Report No. 46, 49th Cong., 1st Sess., p. 215.)' "

That Congress has not seen fit by statutory enactment to eliminate ports from the jurisdiction of Section 3 would indicate its acquiescence in and approval of the Commission's construction of the statute over many years in which it has treated ports as "localities." The weight which should be attached to the Commission's construction is emphasized by the language of this Court in *Davis* v. *Portland Seed Co.*, 264 U. S. 403, where it was said, at page 425:

> "With special knowledge of rate schedules, and relying on Pennsylvania R. Co. *v.* International Coal Min. Co. the Interstate Commerce Commission for ten years has required proof of financial loss as a prerequisite to reparation for infractions of the 4th section. The rule is firmly established. Congress has not shown disapproval."

CONCLUSION.

The primary purpose of Congressional regulation of interstate commerce was to prevent unjust discrimination between persons and places. Consideration of the history of the legislation, both with regard to the original Interstate Commerce Act and subsequent

amendments, leads to the irresistible conclusion that Congress intended that ports should be given the protection it extended to "localities."

The interpretation which has been placed upon Sections 3 (1) and 15 (1) by the Commission is not only highly persuasive that a port is a "locality" within the meaning of those sections, but moreover, is indicative of the fact that Congress ratified and adopted the Commission's construction in later amendments and reenactment. To hold otherwise would nullify the beneficent effects of the Interstate Commerce Act to a great extent.

Respectfully submitted,

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